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No. 08-184

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

114 TENTH AVENUE ASSOC., INC.,

Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1991-1 TRUST, KAREN NASON, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT b/f NYC BHO, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and CARLTON CAPITAL CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENT CARLTON CAPITAL CORP.

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QUESTIONS PRESENTED

Petitioner, a corporate landowner in New York, failed to pay its real estate taxes, and the City of New York sold the tax lien to a Tax Lien Trust (the "Trust"), which duly commenced a judicial foreclosure proceeding and, after obtaining a judgment of foreclosure on default, sold the property at auction.

Petitioner seeks to have this Court extend the holding in *Jones v. Flowers*, 547 U.S. 220 (2006) to the facts in this case in order to vacate that sale.

New York law provides that a party wishing to be relieved of a default judgment must show both a meritorious defense and excusable neglect. On such a motion before the Court that issued the judgment of foreclosure on default, Petitioner failed to make an adequate showing of both a meritorious defense and excusable neglect, and the motion was denied.

Petitioner moved to reargue that motion. The reargument motion was denied, and never appealed.

Petitioner then moved to renew the prior motion seeking to be relieved of a default judgment, principally on the grounds that subsequent to the making of the initial motion, this Court had decided *Jones v. Flowers*, which Petitioner argued materially changed the law and mandated vacature of the default judgment on the grounds that same was violative of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

As such, the petition presents two questions regarding notice of a judicial tax lien foreclosure proceeding:

1) Does a Trust created to hold and liquidate real estate tax liens conveyed to it by a city, which seeks to liquidate those tax liens through Judicial foreclosure proceedings, exhibit sufficient state action to invoke the obligations of Due Process required under the Fourteenth Amendment to the Federal Constitution?

2) Must a party seeking to commence a judicial foreclosure proceeding against a corporate landowner affirmatively take steps to determine whether the initial notice, as personally delivered to the Secretary of State as agent for the corporate landowner, was *or was not* returned unclaimed to the Secretary of State when it was mailed by the Secretary of State to the corporate landowner, and if so, take additional steps reasonably designed to give actual notice of the foreclosure proceeding to the corporate landowner?

CORPORATE DISCLOSURE STATEMENT

The Respondent, Carlton Capital Corp. ("Carlton") is wholly owned by individuals, and has no parent corporations. No publicly held company owns 10% or more of Carlton Capital Corp.'s stock.

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INTRODUCTION

In 2006, this Court decided *Jones v. Flowers* to resolve a conflict among the Circuits and State Supreme Courts concerning whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a *non-judicial* tax sale is returned undelivered.

In *Jones*, a State Commissioner sent notices directly to an individual landowner and, after he learned directly that said notices were returned unclaimed, took no further steps to provide notice to the landowner of the impending sale of his property.

This Court held that under such circumstances: "The Commissioner's effort to provide notice to Jones of an impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case." *Id.* at 239.

In the instant case, the NYC Tax Lien Trust commenced a *judicial* foreclosure proceeding against Petitioner by actually delivering copies of the summons and complaint to the New York Secretary of State, who, in turn, pursuant to statute, mailed a copy of the same by certified mail to the Petitioner at the address last provided for that purpose by Petitioner.

While the mailing by the Secretary of State was returned "unclaimed" to the Secretary of State, resulting in Petitioner not receiving actual notice of the commencement of the judicial foreclosure proceeding, neither the Trust nor Respondent Carlton ever knew

of the mailing being returned unclaimed prior to the date of the sale.

Petitioner seeks, by this Appeal, to have this Court extend *Jones v. Flowers* and thereby engraft onto the New York Statute providing for the method of service of process upon corporations the novel requirements, that: 1) a party seeking to serve a corporation, at least in a tax lien foreclosure case, must inquire of the corporate agent whether the mailing notice to the landowner was received or returned; and 2) if returned, take additional, unspecified steps to notify Petitioner of the commencement of the foreclosure proceeding.

Respondent Carlton argues that no inquiry of the corporation's agent is required under the Constitution, and that even if the Trust had timely learned that Petitioner had no actual notice of the commencement of the judicial foreclosure proceeding, which was not true here, no alternative, reasonable means were available to it to validly effect service of process.

OPINION BELOW

The nature of the Opinion below is adequately stated in the Petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

The nature of the Jurisdiction of this Court is adequately stated in the Petition for a Writ of Certiorari, with the following exception.

Though the closing of title has not yet occurred, and the same is presently stayed pursuant to the Order of the Supreme Court, State of New York, no stay of the closing was effected by the Petitioner's filing of a petition under the Bankruptcy Code, title 11 U.S.C. Chapter 11. *Rodgers v. County of Monroe* (In re Rodgers), 333 F.3d 64 (2nd Cir. 2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that "no State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

This action was commenced by the filing of a summons and complaint on May 20, 2003, seeking to enforce an assigned tax lien certificate by foreclosing Petitioner's interest in the real property located at 114 10th Avenue, New York, New York (the "Premises").

Service of the summons and complaint on Petitioner was accomplished by serving two copies of the summons and complaint along with the statutory fee on the New York Secretary of State pursuant to NY Business Corporation Law ("BCL") §306, which under NY Civil Practice Law and Rules ("CPLR") 311(a) is a proper method for obtaining personal jurisdiction over a corporation.[1]

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1. Under BCL §304(a) "[t]he secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served."

The certified mailing to the Petitioner by the Secretary of State, as required by BCL §306, was made to the address the Petitioner itself had listed with the Secretary of State upon formation, but which it failed to keep properly updated for nearly ten (10) years.

In due course, a Judgment of Foreclosure and Sale was issued by the Court, on default, on October 6, 2004.

In connection with duly scheduling a sale of the property, notice of the sale was published for four consecutive weeks in the New York Daily News, thus giving widely-distributed public notice of the impending foreclosure sale of the Subject Property.

On May 18, 2005, pursuant to the Judgment of Foreclosure and Sale, the advertised public auction of the Premises was held. Respondent, Carlton Capital Corp. appeared at the said auction and successfully purchased the property with a high bid of two million ($2,000,000.) dollars.[2]

Nine days after the auction sale, by order to show cause dated May 27, 2005 (the "Vacatur Motion"), Petitioner moved to have the judgment of foreclosure set aside on the basis of a two page affidavit by the president and sole owner of Petitioner, whose sole "evidentiary" allegations consisted of the following two (2) paragraphs:

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2. Fair market value for the Premises as a matter or law. See., e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994) ("fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale. . . .").

> 3. I have never been served with any papers in this foreclosure action and only learned on May 19, 2005 about the auction sale held on May 18, 2005 from a tenant in my building.
>
> 4. I have information that my former girlfriend and defendant Karen Nason has been receiving copies of the legal papers in this foreclosure action and has never informed me regarding same.

By notice of cross-motion dated June 8, 2005 Carlton moved for intervention and for denial of Petitioner's Vacatur Motion, arguing, *inter alia*, that Petitioner's equity of redemption was extinguished by the foreclosure sale; that no proper basis for excusable neglect had been alleged; and, that no meritorious defense had been made out.

By order dated September 12, 2005, the Supreme Court denied Petitioner's Vacatur Motion and granted Carlton's cross-motion for intervention, ruling, *inter alia*, that an auction sale may only be set aside where fraud, collusion, mistake or exploitive overreaching cast suspicion on the fairness of the sale; and that Plaintiff's service on the Secretary of State was proper service, regardless of the failure of actual delivery to Petitioner, which resulted from Petitioner's own failure to update its address with the Secretary of State for nearly ten (10) years.

All papers submitted by all parties on Petitioner's original Vacatur Motion were silent on whether the certified mailing sent by the Secretary of State under BCL §306 was returned unclaimed, or otherwise.

Contemporaneously with the filing of a notice of appeal from the Order denying the Vacatur Motion, Petitioner served a motion for reargument on or about November 4, 2005.

On November 10, 2005 Petitioner filed for relief under Chapter 11 of the United States Bankruptcy Code for the Southern District of New York under File No. 05-60099 (ALG), thus staying further proceedings in all Courts pursuant to 11 U.S.C. §362(a).

Within weeks of the Chapter 11 filing, Petitioner brought a motion before the bankruptcy court seeking a grant of the very relief denied by the September 12, 2005 Order.

Carlton opposed the Petitioner's (therein, "Debtor") motion, and filed a motion to lift the automatic stay with the Bankruptcy Court. By order dated March 7, 2006, U.S. Bankruptcy Judge, Alan L. Gropper denied the Petitioner's motion, and lifted the automatic stay specifically "to permit the continuation and completion of the pending State Court reargument and appellate process."

Thereafter, by amended notice of motion dated May 5, 2006, Petitioner moved the State Supreme Court for renewal of the Vacatur Motion, claiming that the *Jones* case constituted a "change in the law that would change the prior determination."

By decision and order dated December 11, 2006, N.Y. State Supreme Court Justice Saralee Evans denied Petitioner's motion to renew the Vacatur Motion.

The Appellate Division of The Supreme Court of The State of New York affirmed, and the instant Petition for Writ of Certiorari is addressed to that affirmance.

REASONS FOR DENYING THE PETITION

THE PETITION SHOULD BE DENIED BECAUSE THE TRUST DID NOT VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS

A. State Action is Presumed for the Purposes of this Petition

In the context of 42 U.S.C. §1983, this Court has been held that "private lawyers do not 'act under color of state law' merely by making use of the state's court system." *Fleming v. Asbill*, 42 F.3d 886, 890 (4th Cir. 1994) (citing *Dennis v. Sparks*, 449 U.S. 24, 28, (1980)).

Merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge for the purposes of §1983 liability as to acting "under color of state law". *Dennis v. Sparks, Id.*

Notably, §1983's requirement of action "under color of state law" is identical to the "state action" requirement of the Fourteenth Amendment. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

Notwithstanding, it has been held that a party that makes "use of state procedures with the overt, significant assistance of state officials" (*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S.

478, 486 (1988)), generally presents state action sufficient to invoke the protections of due process. In a judicial foreclosure proceeding such as the one at bar, a court appointed referee is employed to actually supervise the auction sale of property.

Thus, it appears that the question of whether the private securitization of tax liens, and the subsequent foreclosure thereof, fairly raises the Trust's acts to those comprising state action is very much an open issue. *See* F. Alexander, *Tax Liens, Tax Sales and Due Process*, 75 Ind. L.J. 747, 764 n.102 (2000).

Nevertheless, for purposes of Respondent, Carlton's opposition to the Petition for a Writ of Certiorari, we presume that the Trust's actions in invoking state court process in a judicial foreclosure proceeding obligated it to assume a state's full Fourteenth Amendment obligations.

For the reasons that follow, it is submitted that, even though state action is presumed to be present, Petitioner suffered no deprivation of its Due Process rights under the Fourteenth Amendment.

B. Jones Should Not Be Extended to Require Investigative Acts

Jones v. Flowers should not be extended through this case to require any investigative acts by parties attempting to serve process upon corporate defendants.

There is a Constitutionally significant difference between ignoring knowledge already possessed, and not

affirmatively investigating in order to acquire knowledge, regardless of how minimally intrusive that investigative activity may appear. In the case at bar, the Trust had no knowledge of the certified mailing being returned unclaimed, and *Jones* simply does not require the taking of any act to investigate delivery or non-delivery of notice of process.

Jones fills a gap in Constitutional jurisprudence, which avoids the unseemly result of a state actor having actual knowledge of the non-receipt of a jurisdictional notice by an individual party whose rights are sought to be affected, *and despite that actual knowledge*, proceeds to obtain the requested remedy, on default.

Since the pre-requisite of knowledge does not exist on the part of the Trust in the case at bar, the additional steps required by *Jones* in order to effect jurisdiction do not come into play.

This Court in *Jones* did not require that a party to be served receive actual notice of process. Ratifying its prior holding in *Dusenbery v. United States*, 534 U.S. 161, 170 (2002) on this issue, this Court stated: "Due process does not require that a property owner receive actual notice before the government may take his property." *Jones*, at 226.

The sharp issue before the Court was "whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed." *Id.* at 227.

Further, the Supreme Court stated that "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." *Id.* at 230.

Here, the Trust, or the City of New York (the "City"), as, *arguendo*, the party behind the Trust, patently did not have any knowledge of the summons and complaint being returned unclaimed by Petitioner.[3]

What is before this Court is not the situation addressed by *Jones*, i.e., the advance knowledge of a party attempting to provide notice that it *would* learn of the ultimate delivery or non-delivery of the notice. Instead, this case presents the very opposite condition, being where the party attempting to provide notice actually knew that it *would not* learn of the ultimate delivery or not of the notice.

Thus, knowledge of whether or not the notice was ultimately going to be received was *not* unique information about the intended recipient that had to be considered at the time service was attempted. *See Robinson v. Hanrahan*, 409 U.S. 38 (1972).

Using the *ex ante* approach, if there would never be any knowledge absent investigation, the party attempting to give notice only need be concerned with the reasonableness of the method of service itself – and not, from a Constitutional point of view, whether the attempted service was ultimately successful.

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3. Nor did Respondent, Carlton.

If the rule were otherwise, and investigation were required to learn whether actual notice were received, barring which, additional efforts would always be required, the *Dusenbery* rule would collapse into a virtual requirement that actual notice be given in all cases. This Court drew the line to require investigation only where the government has actual knowledge that service has failed. Were the Court to require investigation and further attempts at service in case of failure in every instance, it would remove all meaning from the Court's current requirement of service "reasonably designed to give actual notice."

Petitioner's assertion to this Court that the Trust, in attempting to give notice below, purposefully chose to utilize substitute, Secretary of State service to shield it from knowing whether its attempt at service was successful or not is pure speculation, and not a foundation upon which a rule of Constitutional Law should be based.

Petitioner is asking this Court to substantially expand its holding in *Jones*, when the Court took pains to sharply limit the reach and ambit of that decision.

In *Jones* the notice at issue was served by the Arkansas Tax Commissioner directly and returned to the Commissioner directly: "[the commissioner] attempted to notify Jones of his tax delinquency, and his right to redeem the property, by mailing a certified letter to Jones . . . the post office returned the unopened packet to the Commissioner marked 'unclaimed.'" *Id.* at 224.

In the case at bar, the Trust served the Secretary of State with two copies of the summons and complaint, and there is no indication in the record nor is there any allegation by Petitioner that the Trust ever had any actual knowledge of whether the mailing was returned unclaimed to the Secretary of State.

The fact that there is no requirement under New York law that a party utilizing the service modality afforded by BCL §306 follow up or investigate whether the Secretary of State's mailing was or was not actually received by the party to be served, is not a basis for finding that the party attempting service is turning a blind eye in an attempt to *evade Jones*. As will be discussed below, there were no good alternative means of service available to the Trust.

Nevertheless, Petitioner seeks to have this Court engraft onto NY BCL §306 a Constitutional requirement of investigation that exists nowhere in *Jones*.

In *Jones*, this Court asked (and answered in the affirmative) the question of whether "knowledge on the government's part" of undelivered notice is a "circumstance and condition" that varies the kind of notice required. *Id* at 227.

The Court in *Jones* did not address the question of whether the government "could" learn of the notice's non-delivery, or even whether the government "should" learn of the notice's non-delivery.

Putting it another way, Petitioner is asking this Court to hold that the mere *availability* of knowledge that could be obtained only through active inquiry into whether a party sought to be served was or was not actually given notice by the service method, is a "circumstance and condition" that varies the kind of notice required.

The Court in *Jones* addressed the elementary question of whether a party with *actual* knowledge of non-delivery could turn a blind eye, and simply ignore knowledge it already possessed.

The Court in *Jones* did not address whether and to what extent the Constitution requires a party seeking to provide notice must investigate into whether such notice, "reasonably calculated to inform," actually does inform, *post hoc*.

Petitioner argues that the making of a phone call or written inquiry to the Secretary of State is an easy step to take, and would not be too large of a burden for the Tax Trust to have undertaken in order to confirm delivery or non-delivery of notice of process.[4]

Yet, the making of a phone call or written inquiry is certainly no less burdensome than looking up a phone number in a phonebook, and that arguably minimal activity was expressly determined to be unnecessary in an analogous part of the *Jones* case itself. ("Jones believes that the Commissioner should have searched

4. Notably, there is no showing that either a phone directory search or an internet search would have revealed any address for Petitioner.

for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far.") *Id.* at 236.

The real problem with requiring *any* investigation in seeking to determine if a party to whom notice is addressed actually received such notice, is that there is no logical end to that requirement.

If a party is required to do an investigative act to learn if service was or was not successfully received, and upon learning that the service attempt was unsuccessful, to take additional reasonable steps to attempt to provide notice, the serving party would perforce also be required to investigate whether the additional steps taken, were or were not successful, themselves.

The Constitutional cannot require such an infinite cycle of investigation.

This Court has never held that a party intending to provide notice must investigate, after an attempt at notice, to seek to determine if the notice given was effective.

To the contrary, this Court has held that notice is "constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent" in cases where "the government attempted to provide notice and heard nothing back indicating that anything had gone awry." *Id.* at 227.

Mandating any additional investigative act as a component requirement of the Due Process Clause is a radical departure from current Constitutional Law, and would be tantamount to requiring that actual notice be assured, which this Court has consistently rejected.

C. The Trust is Not Responsible for the Actions of, Nor Chargeable With, the Knowledge of the Secretary of State

The Trust is not responsible for the actions of the Secretary of State in serving process. In arguing otherwise, Petitioner relies upon various lower court cases where a foreclosing party has been held responsible for the actions of the third party to whom service was delegated. These cases are all inapplicable to the issue at hand, most significantly because in them, the agent serving process was the *plaintiff's agent.* Here, the Secretary of State is the *Petitioner-corporation's own agent.*

In *Thompson-Green v. Estate of Drobish*, 2006 WY 126 (Wyo. 2006), personal service was required by statute, and there was no mention of any statute permitting substituted service.

In *Wilson v. Blount County*, 207 S.W.3d 741 (Tenn. 2006), the notice to be served was found to be defective as a matter of law, rendering the issue of proper service moot under the circumstances of that case.

In *Taylor v. Westly*, 488 F.3d 1197 (9th Cir. 2007), the Court rejected a framework where the government completely relied on a third party to give notice, rather

than where the government relied on a statutory scheme specifically designed to have the highest possible likelihood of giving actual notice, as in the instant matter, where corporations are required to keep their addresses for service updated with the Secretary of State.

Petitioner relies on *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) for a related point, arguing that the Secretary of State cannot be considered a corporation's agent for service under BCL §306. (Petition at 18).

In *Wuchter*, this Court held that the only question was whether the substituted service statute "contain[s] a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued." *Wuchter*, 276 U.S. at 18.

New York's BCL §306 obligates the Secretary of State to mail a copy of the process to an address designated by the party to be served.

Wuchter examined a statute permitting substituted service on the Secretary of State for non-resident motorists, individuals merely passing through the state, and not corporations registered to do business within the state. This Court in *Wuchter* further reiterated that corporations "may properly be required to accept service through a public officer as a condition of their doing business in the state." *Id.* at 20.

By asserting that the Trust is as responsible for the acts of the Secretary of State as it would be for the acts of a private process server, Petitioner ignores that

the Secretary of State is its own agent, and not the agent of the Trust. *Wuchter* is not to the contrary.

Petitioner improperly imputes the Secretary of State's knowledge to the Trust herein. The Trust is not the Secretary's principal. An agent's knowledge is imputed only to its principal. *National Bank v. National Herkimer County Bank*, 225 U.S. 178 (1912).

In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988), (a case involving the Hague Convention), this Court held that: "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends." *Id.* at 708.

Here too, New York courts hold that service is complete upon delivery to the Secretary of State. *Perkins v. 686 Halsey Food Corp.*, 36 A.D.3d 881 (2nd Dept. 2007).

This Court has refused to impute knowledge belonging to one state agency even to other state agencies, let alone city agencies. In *Jones*, this Court found that the State Lands Commissioner was not required to even look to State income tax rolls to determine Jones's address. *Jones* at 236 ("Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far.").

In the instant matter, it is not even an issue of one state agency versus another. Rather, here the Trust and the City are wholly distinct from the State of New York and its agencies, such as the Secretary of State.

The City of New York is not a division or agent of the State of New York. *See generally Hernandez v. Hammons*, 98 N.Y.2d 735 (2002); *see also* NY CLS St Admin P Act §102(1).

Petitioner cannot ellipse this relationship by simply implying that all government agencies are one and the same. New York State has 62 counties, which are subdivided into 932 towns and 62 cities. Cities such as New York have their own charter and executive, legislative and judicial branches highly distinct from the government of the State in which the City resides.

Thus, even if one State agency must consult with other State agencies in order to comply with *Jones*'s notice requirements for Due Process purposes, which this Court did not require under *Jones*, that rule would not apply as between the Trust or the City of New York, neither of which are State agencies, and the New York State Department of State, which manifestly is a New York State agency.

Notably, there has never been a suggestion that the Trust could have been informed of Petitioner's non-receipt of notice without making an active inquiry of the Secretary of State.

No matter how much Petitioner strains to analogize the facts here to those in *Jones*, it cannot erase the fact that the Trust never had any knowledge that its service through the Secretary of State resulted in the Secretary of State's certified mailing on Petitioner being returned unclaimed.

D. No Practical Alternative Steps Existed to Effectively Serve Petitioner

Petitioner besmirches the Trust's attempt at service of process upon the landowner, by oft repeating variations on the allegation that, a party who chooses to utilize the method of service permitted by BCL §306, does not act as one "desirous of actually informing" the owner.

Specifically, Petitioner erroneously states, without any evidentiary support, that: ". . . it is well known to New York practitioners that the substituted service statute the Trust elected to use here, BCL §306(b), commonly results in the failure of actual notice. . . ." (Petition at 17).

Petitioner then attempts to bootstrap this baseless assertion into a rule of Constitutional law invoking this Court's holding in *Greene v. Lindsay*, 456 U.S. 444 (1982), a case which held that the mere posting of a notice on a housing project apartment before the issuance of a final order of eviction violated Constitutional Due Process.

The Court in *Greene* apparently accepted the notion that service by the particular posting there failed "to afford actual notice in a 'not insubstantial' number of cases" *Id.* at fn 4. This "fact" in *Greene* was noted by the Dissent therein, as based upon "the scant and conflicting testimony of a handful of process servers in Kentucky." *Id.* at 456.

The factual predicate put forth by Petitioner in this case is based on no evidence whatsoever, in its Petition or as placed before the Courts below, and accordingly should be given no weight. In fact, one of the cases cited by Petitioner for its dubious proposition shows full well how New York Courts have dealt with those isolated instances where Secretary of State service was ineffective.

In *Mintz v. Astoria Holding Corp.*, 56 A.D.2d 595 (2nd Dept. 1977), the Appellate Division vacated the default judgment under NY CPLR 5015 because it found that the Defendant did not have actual notice of the suit until after the default judgment was entered, and met its burden of showing the existence of a "colorably meritorious defense". *Id.* at 596. This is exactly what Plaintiff tried to do in the New York State Supreme Court. That motion was denied only because Plaintiff failed to show it had a meritorious defense; not because the Court ignored Plaintiff's allegation that it never received actual notice.

Petitioner also claims that because the Trust knew, or should be charged with knowing Petitioner's correct address, it somehow should have been required to serve the summons by more direct means than through the Secretary of State.

Contrary to such assertion, it would not have been practicable, or in any way more reasonable for the Trust to utilize any other means of providing notice of the commencement of the foreclosure action, than the one utilized.

It is important to note that Petitioner herein is a corporation that cannot simply be served as an individual is served.

Under New York law, service on individuals may be made pursuant to CPLR 308, which provides for either personal delivery, or delivery to a person of suitable age and discretion at the actual place of business or usual place of abode coupled with mailing by regular mail, or posting of the summons at the actual place of business or usual place of abode coupled with mailing by regular mail.

If an individual is to be served in New York, one only need learn of that individual's actual place of business or usual place of abode in order to effect valid service.

Under New York law, a corporation may only be served pursuant to CPLR 311, which, in contrast to service on an individual, requires delivery to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law, including the Secretary of State.

Before one can be assured, *ex ante*, that service would be effective, one has to know the identity of "an officer, director, managing or general agent, or cashier

or assistant cashier or to any other agent authorized by appointment or by law to receive service".

Such knowledge is often impossible to ascertain, particularly for a small, private corporation, such as Petitioner.

One cannot look in a phone book, public record, internet web site, or other similarly accessible search device to learn the identity of "an officer, director, managing or general agent, or cashier or assistant cashier" or "any other agent authorized by appointment or by law to receive service" for the Petitioner.

Nor can one serve a corporation by mail upon any business address, or by personal delivery to just any person who appears to be employed at a corporation's business address.

Thus, service by substituted service upon the Secretary of State was the most reliable method available to the Trust for serving the Petitioner.

E. Court Proceedings That Offer Relief From Default Judgments Upon a Showing of Excusable Neglect and a Meritorious Defense Meet All Due Process Requirements

In *Jones*, the Executive Department of Arkansas, in pursuance of its tax collecting function, took title to the individual taxpayers home.

In this case, a judicial foreclosure proceeding was commenced, under which proceeding, an auction sale of

corporate Petitioner's property was sold. Since legal title had not passed to Respondent Carlton yet,[5] Petitioner employed the option available to it under NY CPLR 5015 to move for vacature of the default judgment of foreclosure and sale on the dual grounds of showing excusable neglect and a meritorious defense.

New York courts have held that a party's "right of due process was not violated since it was afforded an opportunity to vacate the default upon the showing of a meritorious defense." *Micarelli v. Regal Apparel, Ltd.*, 52 A.D.2d 524 (1st Dept. 1976).[6]

It is noteworthy that in Petitioner's initial motion for relief from the default judgment of foreclosure and sale, it made no showing of any meritorious defense and it was on that basis that its motion failed and its default was upheld.

Though Petitioner made an attempt to show a meritorious defense in its renewed motion for vacatur of the default judgment, the Appellate Division held that "the new facts submitted by 114 Tenth Avenue were

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5. Under New York law, equitable title passes at the time of auction, and record or legal title passes when the referee delivers a deed, which event has not yet occurred, due to the continued pendency of a stay issued by the New York State Supreme Court, pending appeal.

6. Corporate defendants served under *Business Corporation Law §306* have frequently obtained relief from default judgments where they had a wrong address on file with the Secretary of State, and consequently, did not receive actual notice of the action in time to defend. *Solomon Abrahams, P.C. v. Peddlers Pond Holding Corp.*, 125 A.D.2d 355 (2nd Dept. 1986).

readily available at the time the prior motion was made and 114 Tenth Avenue failed to provide a reasonable justification for failing to present these facts in support of its initial motion. Appendix A to Petition for a Writ of Certiorari.

The fact that Petitioner was unsuccessful in its attempt to vacate the default judgment rendered against it does not mean that Petitioner was deprived of due process under the Federal Constitution.

CONCLUSION

For the foregoing reasons, Respondent Carlton Capital Corp. respectfully requests that this Court deny the Petition for a Writ of Certiorari and decline to review the New York Appellate Division decision and order below.

Respectfully submitted,

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